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No. 92-1817

In The

# Supreme Court of the United States

October Term, 1992

MILES INC.,

*Petitioner,*

v.

DONALD BRUCE SONDERGARD,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION

GLEN H. JOHNSON
(Counsel of Record)
JOHNSON HUFFMAN
3202 West Main Street
Rapid City, SD 57702
(605) 348-7300

PAUL D. RHEINGOLD
RHEINGOLD & MCGOWAN
113 East 37th Street
New York, NY 10016
(212) 684-1880

WAYNE F. GILBERT
JAY A. ALDERMAN
JOHNSON HUFFMAN
Rapid City, SD 57702
(605) 348-7300

*Counsel for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED

I. IS THE REGISTRATION TO DO BUSINESS AND APPOINTMENT OF A REGISTERED AGENT FOR SERVICE OF PROCESS SUFFICIENT "CONSENT" TO IN PERSONAM JURISDICTION BY A FOREIGN CORPORATION WHERE THE CAUSE OF ACTION AROSE OUTSIDE THE FORUM STATE?

II. IF A FOREIGN CORPORATION REGISTERS TO DO BUSINESS, APPOINTS AN AGENT FOR SERVICE OF PROCESS, AND OFFERS ITS PRODUCT FOR SALE THROUGHOUT THE FORUM STATE, HAS THAT CORPORATION ESTABLISHED SUFFICIENT CONTACTS WITH THE FORUM STATE TO UPHOLD THE EXERCISE OF GENERAL JURISDICTION?

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**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

Petitioner Miles Inc. ("Miles") manufactures Alka-Seltzer Plus Cold Medicine, which it distributes throughout the United States including South Dakota. Miles had applied to the South Dakota Secretary of State for a Certificate of Authority to transact business in South Dakota and was granted such authority in August 1991. At the same time, Miles appointed CT Corporation System as its registered agent in the State of South Dakota.

In October 1989 while residing in Utah, Respondent Donald Sondergard suffered a stroke after consuming Alka-Seltzer Plus Cold Medicine. The stroke was caused

by a chemical interaction of Alka-Seltzer Plus with a prescription anti-depressant he was taking. Sondergard thereafter moved to South Dakota where this lawsuit was commenced in October 1991, two months after Miles had registered to do business and appointed CT Corporation as its agent for process in South Dakota.

Upon Miles removal of the case to the United States District Court for the District of South Dakota, Western Division, the district court immediately granted Miles' Motion to Stay Discovery[1], and thereafter, Miles' Motion to Dismiss on personal jurisdiction grounds. The District Court reasoned that, while the concept of general jurisdiction would be adopted by the South Dakota Supreme Court, and further that by registering to do business and appointing a resident agent for service of process, Miles had consented to the jurisdiction of South Dakota Courts, nonetheless, the exercise of personal jurisdiction over Miles could only take place for torts committed by Miles within the state of South Dakota after it had registered to do business. See District Court Oral Decision (Petition Appendix A35, 36).

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[1] The District Court granted Miles' Motion to Stay Discovery by Order of December 12, 1991. Contrary to Miles' assertion, Mr. Sondergard's counsel did not waive an evidentiary hearing on the nature and extent of Miles' contacts with South Dakota. In fact, on January 15, 1992, Mr. Sondergard filed a Motion to Reconsider or Alternatively Stay the Court's Decision on Miles' Motion to Dismiss Pending Limited Discovery. The Court denied this Motion and entered a Judgment dismissing the case without prejudice.

The Court of Appeals for the Eighth Circuit reversed, holding that when a foreign corporation expressly consents to jurisdiction in the forum state by registering to do business and appointing an agent for process, the minimum contacts/due process analysis of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) becomes unnecessary. *Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1396 (8th Cir. 1993). *See also, Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990).

Moreover, the Eighth Circuit found that Miles' contacts with the State of South Dakota were, nonetheless, sufficient to satisfy the requirements of *International Shoe* and its progeny. Miles had admitted that it distributed Alka-Seltzer Plus for sale throughout South Dakota at the time Mr. Sondergard ingested it. The Eighth Circuit reasoned that Miles had purposely availed itself of the benefits and privileges of South Dakota's laws from its efforts to market its product in South Dakota, and that South Dakota's exercise of personal jurisdiction over Miles would not violate traditional notions of fair play and substantial justice.

## REASONS FOR DENYING THE PETITION

Petitioner Miles claims that *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) makes a foreign corporation's express consent to personal jurisdiction dependent nevertheless upon a minimum contacts analysis to satisfy due process and that Miles' contacts with the State of South Dakota are insufficient to support the exercise of personal "long-arm" jurisdiction. Miles therefore asserts

that the Eighth Circuit's opinion in this case is wholly inconsistent with other federal precedent, and that apparent conflict and confusion necessitates review by the Supreme Court.

The genesis of any confusion is Miles' interpretation of the authority it cites, and not any fundamental conflict or disagreement among the various decisions of other circuits or this Court. While addressing the issue of general jurisdiction, Miles artfully mixes the significantly different factual and legal concepts of implied and express consent to jurisdiction and in so doing creates a conflict that otherwise does not exist.

In consequence, and contrary to the manner in which Miles incorrectly characterizes the status of the law, the Supreme Court recognizes that by appointing an agent for service of process, a foreign corporation expressly consents to the jurisdiction of the forum state. And in any event, given Miles' substantial business contacts with the State of South Dakota, the due process analysis of *International Shoe* is undoubtedly satisfied. Because of these facts, the instant case is nothing more than a typical general jurisdiction case in which a foreign corporation has registered to do business, appointed an agent for service of process, and purposefully directed its activities toward the forum state. Because it is fact specific and the Eighth Circuit's decision is based on long standing authority, this case does not present the novel opportunity to clear up the perceived conflict that Miles claims exists.

## I. THE EIGHTH CIRCUIT'S RULING THAT PERSONAL JURISDICTION MAY CONSTITUTIONALLY BE BASED SOLELY ON THE APPOINTMENT OF A REGISTERED AGENT IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

In considering the issue of express consent to personal jurisdiction, the Eighth Circuit observed:

> "that appointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum-contacts or due-process analysis to justify the jurisdiction is unnecessary."

*Sondergard v. Miles, Inc.*, 985 F.2d at 1396 (quoting *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d at 1200).[2] After addressing the differences between specific and general jurisdiction, the Eighth Circuit did not find that a conflict existed over the recognition of implied and express consent, nor that it was necessary to choose one rule over the other. Rather, the Eighth Circuit recognized the existence of express consent to jurisdiction, and cited both circuit court and Supreme Court authority as support. *Sondergard*, 985 F.2d at 1392, 1395-97. *See also, Knowlton*, 900 F.2d at 1199-1200.

Miles principally relies on three circuit court cases for the proposition that the appointment of an agent for

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[2] *See also, Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3rd Cir. 1991).

service of process, without more, is not sufficient to confer personal jurisdiction. *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83 (1st Cir. 1990); *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir.), cert. denied, 404 U.S. 948 (1971). On close examination, however, it is clear that the cases above were decided in the context of the forum state's long-arm statute – applying the principles of implied consent. Moreover, the same cases contain significantly different factual circumstances than are present here.

In this case, the Eighth Circuit was specifically asked to decide whether the act of appointing an agent for service of process automatically confers jurisdiction over a corporation on any cause of action (i.e., jurisdiction based on express consent). In contrast, the cases cited by Miles do not specifically address the issue of express consent, but rather, proceed directly to the issue of whether personal jurisdiction exists, if at all, under the "minimum contacts" analysis (i.e., implied consent) of *International Shoe* and its progeny. In other words, the cases cited by Miles essentially treat the act of appointing an agent for service of process as only one more "contact" with the forum state, and not as an independent source of jurisdiction.

Only one of the above cases cited by Miles appears to address the question of express consent. *See, Siemer v. Learjet*, 966 F.2d at 183. However, the court in *Siemer* pointed out that "[n]o Texas state court decision has held that [the Texas Business Corporation Act] acts as a consent to jurisdiction over a corporation in a case such as ours – that is where plaintiffs are non-residents and the

defendant is not conducting substantial activity within the state." *Id.* Unlike the Eighth Circuit's analysis of South Dakota law, the Siemer court was unable to locate Texas authority recognizing express consent to general jurisdiction. The Siemer court simply proceeded to decide the case on the implied consent (minimum contact) principles of *International Shoe*. Moreover, in this case, Donald Sondergard was and is a resident of the state of South Dakota, and Miles did and continues to do substantial business in the state.

Contrary to Miles' claims, the First Circuit does recognize express consent as a valid basis for obtaining personal jurisdiction over a foreign corporation. In *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695 (1st Cir. 1984), the plaintiff asserted jurisdiction based upon personal service of the defendant's registered agent. The defendant claimed that service of process would be "required or permitted by law" only if the corporation could be served pursuant to New Hampshire's long-arm statute. The Court rejected defendant's view. *Id.* at 697.

The First Circuit in *Holloway* observed that, "[i]t is well-settled that a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent's authority." *Id.* (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 170-71 (1939); *Pennsylvania Fire Insurance Co.*, 243 U.S. 93, 95 (1917); Restatement (Second) of Conflicts of Laws § 44 (1971)). Though the *Holloway* Court found some causal connection between the defendant's activities in the forum state and plaintiff's injury, the clear import of the case is that by

appointing an agent for service of process, a foreign corporation voluntarily consents to the jurisdiction of that state's courts.[3]

The Eighth Circuit's decision is likewise consistent with the rule in *Neirbo*, and *Pennsylvania Fire*, and with other Supreme Court precedent decided after *International Shoe*. *See e.g.*, *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952).[4]

Although parties may not waive subject matter jurisdiction, they may waive personal jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).[5] Therefore, consent has been recognized as a basis for the exercise of general personal jurisdiction.

Express consent has been found to be a basis for jurisdiction when a foreign corporation appoints an agent for service of process. *See, Neirbo*, 308 U.S. at 170-71 and

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[3] *See also, General Contracting and Trading v. Interpole, Inc.*, 940 F.2d 20, 22 (1st Cir. 1991) (citing *Holloway, Knowlton* and *Pennsylvania Fire*); *Ytuarte v. Gruner*, 935 F.2d 971 (8th Cir. 1991); *Deines v. Vermeer Mfg. Co.*, 752 F.Supp. 989 (D.Kan. 1990); *Anderson v. U.S.*, 220 F.Supp. 769 (E.D.Penn. 1963); *Marshall v. Mole Constructors*, 193 F.Supp. 617 (W.D. Penn. 1961); *Arney v. Central Electric & Gas Co.*, 66 F.Supp. 401 (D.Minn. 1946).

[4] *See, Sternberg v. O'Neil*, 550 A.2d 1105 (Del.Supr. 1988) for a comprehensive examination of express statutory consent to jurisdiction by means of appointing a registered agent for service of process.

[5] *See also, Hoffman v. Blaski*, 363 U.S. 335 (1960).

*Pennsylvania Fire*, 243 U.S. at 95. Justice Holmes in *Pennsylvania Fire*, concisely summarized the applicable principle as follows:

> The Defendant had executed the power of attorney that made service upon the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases there would be equally little doubt. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction could not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert.

243 U.S. at 95. The unanimous opinion, written by Justice Holmes, held that Missouri could constitutionally exercise general jurisdiction over the defendant foreign corporation, and "not deprive the defendant of due process," even though its only apparent contact with Missouri was its designation of the Missouri Superintendent of Insurance as its registered agent. *Id.*

Petitioner Miles claims that the Supreme Court's recognition of express consent to jurisdiction came to an end with the decision in *International Shoe*. Arguing that due process depends upon the quality and nature of the activity of the defendant in the forum state, Miles maintains that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe*." *See, Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

When read in their proper context, however, the holdings in *International Shoe*, and other Supreme Court cases decided thereafter, are entirely consistent with the continued viability of the earlier holding in *Pennsylvania Fire*.[6]

*Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952), upheld the constitutional validity of an exercise of *in personam* general jurisdiction with respect to a claim unrelated to the foreign corporation defendant's forum activity. The context of the case involved the application of the forum state's long-arm statute, and a search for minimum contacts. It was necessary for the *Perkins* Court to conduct a minimum contact analysis because the foreign corporation was not registered to do business in the forum state, and had not appointed an agent for service of process. Nevertheless, *Perkins* reaffirmed the principle that there would have been no need to search for minimum contacts if express consent had been given:

> Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service and receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state

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[6] *See In Re Des Cases*, 789 F.Supp. 552, 591 (E.D.N.Y. 1992) ("Although the Supreme Court has not directly pronounced on the subject since 1945, the constitutionality of the traditional practice of asserting general jurisdiction solely on the basis of a corporation's being licensed to do business in the forum seems to have survived *International Shoe*. *See Burnham v. Superior Court*, 495 U.S. 604 (1990) (plurality opinion) (*International Shoe* did not supplant long – and widely – accepted methods of asserting jurisdiction")).

> through such service of process upon that representative. 342 U.S. at 444.

*Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), continued the rationale that due process considerations are different when jurisdiction is based on implied consent rather than on express consent. When jurisdiction is based on implied consent, "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Id.* at 471-72 (citing *International Shoe*, 326 U.S. at 319). However, immediately after stating this general proposition, the *Burger King* Court reiterated the position that personal jurisdiction is waivable:

> [w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented* to suit there, due process is satisfied if the defendant has minimum contacts with the forum.

*Burger King*, 471 U.S. at 472. (emphasis added). *Burger King* and *Perkins* thus reaffirm that due process is satisfied by express consent, since express consent constitutes a waiver of all other personal jurisdiction requirements.

*Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988) also appears to accept the express consent rationale. The issue in *Bendix*, as in *Perkins*, involved a forum state attempting to assert jurisdiction over an unregistered foreign corporation. The Court stated:

> [D]esignation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in matters to which Ohio's tenuous relation would not otherwise extend. *Cf. World-*

> *Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Ohio statutory scheme thus forces a corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio and perpetuity. Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden.

486 U.S. at 891. Based on the above decisions, and the Eighth Circuit's analysis of both federal and South Dakota state law, it is clear that express consent remains a valid means of obtaining personal jurisdiction over a foreign corporation. The Eighth Circuit's decision hardly presents a pathbreaking approach to the exercise of general jurisdiction. It is consistent with the holdings of the Supreme Court and should not be reversed.

## II. THE EIGHTH CIRCUIT'S ALTERNATIVE RULING THAT MILES' BUSINESS ACTIVITIES IN SOUTH DAKOTA WERE SUFFICIENT TO SUPPORT *IN PERSONAM* JURISDICTION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND THE SUPREME COURT.

Notwithstanding the Eighth Circuit's holding that Miles had expressly consented to the jurisdiction of South Dakota courts by appointing an agent for service of process, the Court alternatively proceeded to assess the quality and quantity of Miles' contacts with South Dakota and

found that Miles' forum contacts were sufficient to support the exercise of general jurisdiction. However, Miles contends that even under the application of general jurisdiction, Miles is not amenable to suit in South Dakota.

Miles cites *Siemer* and *Ratliff* for the proposition that the mere sale of a defendant's products in the forum state is not sufficient to obtain jurisdiction consistent with the Due Process Clause. That is an over generalization, however. A close examination of the facts in both cases reveals that the quality and quantity of defendant's contact with the forum state were minimal compared to Miles' presence and sales in South Dakota.

*Ratliff* involved a consolidated appeal by two drug companies who were sued for injuries caused by the use of their products. The forum activity of one company was limited to "solicitation by mail to dealers and wholesalers, and the mailing of promotional literature to approximately 650 doctors on its mailing lists." 444 F.2d at 746. The other company had actually registered to do business in the state, and had appointed an agent for service of process. *Id.* That same company also maintained five detail men in the state who promoted the companies' products through personal contacts with doctors and drugstores throughout the state. *Id.* However, "their primary responsibility is the promotion of drugs, not the actual sale of them." *Id.*

As the Court in *Ratliff* aptly pointed out, "[a]pplying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another." *Id.* at 748. Neither drug company did substantial business in the forum state. In contrast, Miles admits that Alka-

Seltzer Plus probably does appear on the shelves of grocery and drug stores in every state.

Likewise, in *Siemer*, defendant Learjet had registered to do business and appointed an agent for service of process in the forum state of Texas. However, only slightly over one percent of Learjet's sales occurred in Texas – not amounting to substantial activity according to the Court. 966 F.2d at 183.

Miles also cites other circuit court opinions for the same proposition. *See e.g., Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984) and *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987). In *Glater*, defendant Eli Lilly employed sales representatives in the forum state, marketed its products nationwide, and advertised its products in journals circulated in the forum state. However, neither the sales representatives nor Eli Lilly directly sold products in the forum state, nor had Eli Lilly appointed an agent to receive service of process.

The First Circuit in *Glater* found that Eli Lilly's contacts with the forum state were "indistinguishable" from a similarly situated defendant drug company in *Seymour v. Parke, Davis & Co.*, 423 F.2d 584 (1st Cir. 1970). *Glater*, 744 F.2d at 217. In *Seymour*, the First Circuit held that where "defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume jurisdiction." *Seymour*, 423 F.2d at 586-87. Once again, Miles' contacts with the State of South Dakota are more continuous, systematic and pervasive then defendant's contacts in *Glater* or *Seymour*.

In *Bearry*, defendant Beech Aircraft sold $250,000,000 worth of products in the forum state of Texas. However, the Fifth Circuit found that these individual sales did not amount to the type of continuous and systematic contacts sufficient to support general jurisdiction. Beech Aircraft made an effort to limit its exposure to general jurisdiction. The Fifth Circuit held:

> Beech exercised its right to structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states such as Texas, carefully requiring the negotiation, completion, and performance of all contracts in Kansas. Beech has not afforded itself the benefits and protection of the laws of Texas, but instead has calculatedly avoided them.

818 F.2d at 375-76. Significantly, Beech Aircraft had never qualified to do business nor maintained an agent for service of process in Texas. *Id.* at 372.

By comparison Miles, unlike the defendant's mentioned above, purposefully sought out the South Dakota market for the sale of its product, registered to do business and appointed an agent for service of process. The totality of Miles' contacts warrant the exercise of general personal jurisdiction, and in so holding, the Eighth Circuit was not inconsistent with the authority referenced above.

Nor is the Eighth Circuit's decision inconsistent with the precedent of this Court. Little improvement could be made on how the Eighth Circuit succinctly characterized the facts and law in this case:

> In any case, we could not conclude that Miles is unconstitutionally burdened by having to

defend this suit in South Dakota. Even without the appointment of the process agent, Miles should have foreseen similar suits in South Dakota at the time Sondergard consumed Alka-Seltzer Plus. Miles admits that it distributed Alka-Seltzer Plus for sale throughout South Dakota at the time Sondergard took it. Its sales in South Dakota are "not simply an isolated occurrence, but arise [] from the efforts . . . to serve, directly or indirectly, the market for its product in [South Dakota]." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Thus, Miles had purposely availed itself of the benefits and privileges of South Dakota's laws and economy. *See, e.g., Hanson v. Denckla*, 355 U.S. 220, 253-54 (1957). Its own activities created a connection with South Dakota through which it could reasonably foresee being haled into court in South Dakota. *See, e.g., World-Wide Volkswagen*, 444 U.S. at 296. Had Sondergard consumed the Alka-Seltzer Plus in South Dakota, there would be no question about the constitutionality of South Dakota's personal jurisdiction.

Thus, Miles is left to argue that they could not foresee being sued in South Dakota on this particular cause of action. This argument rings hollow, however, when one realizes that Miles does not engage in face-to-face transactions with the buyers of its products, and does not attempt to structure its sales of Alka-Seltzer Plus with regard to whether or not it might be sued in South Dakota. Instead, it sells Alka-Seltzer in every state. Because Miles does not limit who may buy its product or where they may buy it, we cannot conclude that Miles is unconstitutionally burdened by having to defend this suit

> in South Dakota simply because the plaintiff did not consume its product there. We believe that South Dakota's exercise of personal jurisdiction over Miles would not violate "traditional notions of fair play and substantial justice." *See, e.g., International Shoe v. Washington,* 326 U.S. 310, 318 (1945).

*Sondergard v. Miles, Inc.*, 985 F.2d at 1397.

## CONCLUSION

In summary, the questions presented by Miles in the instant case do not warrant review by this Court. Contrary to Miles' claim, the Eighth Circuit Court of Appeal's decision is analytically consistent with other relevant federal authority addressing the issue of express and implied consent to jurisdiction. Notwithstanding the existence of express consent, Miles' contacts with the State of South Dakota warrant the exercise of general *in personam* jurisdiction.

In any event, the facts in this case do not present the kind of pure "express consent" issue Miles claims it does. It is submitted that if this court wishes to review the exercise of express consent to jurisdiction, the instant

case, given Miles' obvious and substantial direct contacts with the forum, does not provide the appropriate vehicle for such consideration.

Respectfully submitted,

GLEN H. JOHNSON
(Counsel of Record)
JOHNSON HUFFMAN
3202 West Main Street
Rapid City, SD 57702
(605) 348-7300

PAUL D. RHEINGOLD
RHEINGOLD & MCGOWAN
113 East 37th Street
New York, NY 10016
(212) 684-1880

WAYNE F. GILBERT
JAY A. ALDERMAN
JOHNSON HUFFMAN
Rapid City, SD 57702
(605) 348-7300